RECENT AMERICAN DECISIONS.

Superior Court, Eastern District of Georgia.

STATE OF GEORGIA EX RELATIONE JAMES J. WARING v. THE GEORGIA MEDICAL SOCIETY.[1]

Membership of a club which is purely literary or social or scientific, and does not own property, cannot be considered a right of property; nor is the right of meeting the other members a vested right of which courts can take cognisance.

Mandamus is not the proper form of remedy for a member of such a club who is expelled.

THE relator filed his petition in the Superior Court of Chatham county, alleging that the respondent, The Georgia Medical Society, had deprived him of his privileges as a member of that body, by an attempt at his expulsion, for causes which he alleged to be insufficient in law, and in a manner not in accordance with law.

The facts appeared to be that the relator being a member of the defendant society was charged substantially, 1. With having "forfeited his position as a gentleman of respectable social standing," in that he had become surety on the bond of one White, a person of color, elected clerk of the court in opposition to the wishes of the entire respectable community, and then under indictment for larceny, thereby facilitating the qualification for office of a disreputable person, and also in that he had become surety on the bonds of various persons of color charged with riot, thus upholding persons of dangerous character; 2dly. With having "conducted himself in such manner as would render him ineligible to membership," setting forth the same acts as above charged, with others of which he was found guiltless.

The constitution of the society provided that "the resident members of this society shall be composed of regular graduates of medicine, and shall be gentlemen of respectable social position."

A by-law of the society also provided that:—

"Any member who shall be guilty of ungentlemanly conduct during the session of the society, or who shall conduct himself, out of the society, in such a manner as would render him ineligible to membership, shall be expelled from the society according to the wishes of two-thirds of the members of the society present: *Provided*, that in every instance specific charges

[1] We are indebted for this case to John H. Thomas, Esq., of Savannah.—EDS. AM. L. R.

be set forth and handed to the individual at least one month before the society take action thereon."

Notice of the foregoing charges was duly given to relator, and at a subsequent meeting of the society he was tried and adjudged guilty, the relator objecting to the proceedings as against law. A vote was then taken to expel relator but was defeated, and a resolution passed that he be censured by the president. The relator, on being requested, came to the meeting, and the president was proceeding to censure him when he arose and objected and then left the room, but returned in a few minutes and stated that he would receive the censure. A resolution was then passed requesting him to resign, which he declined to do. At a regular meeting of the society on October 14th 1868, a resolution was passed reciting the principal facts, and also that the relator had at two previous meetings behaved discourteously to the society, and in such a manner as would render him ineligible to membership, and that at the next regular meeting in November the society would vote upon expelling him. Of this the relator had due notice one month previous to the November meeting, and at this meeting he was expelled by a vote of two-thirds of the members present. The relator was not present at this meeting but made a written communication stating that he was unable to attend by reason of severe indisposition, disclaiming any intentional discourtesy to the society, and protesting against any proceedings on the resolution sent to him, as unlawful and unjust.

Hartridge and *Chisholm*, for relator, cited the following authorities: 1 Black. Com. 471, 476, 481; 2 Johns. Chan. R. 335; 6 Conn. 544; 4 Wheat. 657, 674, 699; 20 Pick. 495; 1 S. & R. 254; 2 Id. 141; 6 Conn. 532; 5 Watts 152; 10 Wend. 293; 1 Cowen 423; 12 John. 414; 2 Binney 448; 1 Strange 1051; 1 Cranch 168; 2 Esp. N. P. 682; 2 Burr. 723, 731, 738, 1045; 3 Id. 1265, 1267; 4 Id. 2186; 1 Id. 538; 2 L. Raym. 1564; 4 Geo. 44, 117; 2 Esp. N. P. 317-8; 2 Esp. R. 677; 1 Strange 557; 6 S. & R. 469; 4 Bac. Ab. 507; 12 Geo. 178; 26 Id. 665, 676; 2 Esp. N. P. 677, n. 3; Const. of Georgia, §§ 3, 9, 10; 10 Mod. 76; Cowp. 503; 2 Burr. 731; 6 S. & R. 476; Angel & Ames on Corp., chap. xii., §§ 408, 409; 2 Kent's Com. 298; 1 Sumner 301; 2 Term R. 181; 4 Bac. Ab. 500; 2 Selw. N. P. 1083, n.; 2 Black. Com. 21, 37; 3 Term R. 651;

3 East 188; 31 Geo. 206; 8 Term R. 352; 1 Black. Com. 44–60; 1 Bish. Crim. Law, §§ 55, 58, 114; Eden on Pen. Laws 309; Tapp. on Man. 119, 201, 358, 374, 392–4; Angel & A. on Corp. 597, 683, 711; T. U. P. Charl. (Ga.) 235; Grant on Corp.; Willcock on Mun. Corp. 150; Code of Georgia, §§ 1679, 3142, 4227, 712; 2 Barn. & Ald. 620; 5 Id. 899.

Thos. E. Lloyd, and *Jackson, Lawton & Basinger*, for respondent, cited the following authorities: Code of Georgia, § 1416–1424; 14 Geo. 388, 9; Ang. & Ames on Corp. 3, 602; 7 Eng. Com. L. 295; 1 Sumner 284, 299; Code of Georgia, §§ 1671–2, 3, 3143–4; Ang. & Am. on Corp. 615; 26 Geo. 675; 1 Keb. 84; Carthew 92; 2 Shower 191; Tapp. on Man. 69, 70, 145–6; 2 Black. Com. 266; 2 Term R. 352–6; 2 Kent's Com. 294; Black. Com. 471; 1 Kent's Com. 297; 3 Wend. 476; 2 Binney 148; 5 Burr. 2761; 1 Black. 25–58; 23 Eng. Com. L. 66, 71; Code of Georgia, § 3706; 7 East 353; 36 Geo. 461; 1 Sumner 284, 299; 2 Kent's Com. 304; 2 Term R. 182, 356; Ang. & Am. on Corp. 602; 2 Term R. 177; 2 Cowp. 523; 7 Eng. Com. L. 245; Code of Georgia, § 3145; 1 Mod. 82; 4 Burr. 2186; Tapp. on Man. 137, 138, 216; 7 Term R. 391; 4 Geo. 26; Code of Georgia, § 3142.

SCHLEY, J.—This cause came on to be heard, and after elaborate argument the court is called upon to decide the legal points made, which are to control ultimately this case; and after analyzing its merits, I have resolved it into two questions.

The *first* is, had or has Dr. James J. Waring any vested rights as a member of The Georgia Medical Society? And, *second*, if he had or has, is *mandamus* the proper remedy for the enforcement of his rights?

The only rights which the relator can have, as a member of the society, are either, *first*, a right to property; *second*, a right to membership, with a view to the improvement of the science of medicine; *third*, a right to practice his profession and collect his fees; or, *fourth*, a right to meet the members of said society on social equality.

In reference to the first right, to wit, the right to property, it may be well to look to the charter to ascertain what the object of this society is. It is clearly not to acquire property. No right

is given to the society by the charter to buy or sell. It can only receive bequests or donations. And even these it cannot take for any individual benefit, but only for the promotion of the purposes of the society. And what are they? The lessening of fatality and the improvement of the science of medicine. Can any physician purchase any right in or to the society? Can he sell any right he as a member of the society may have? Can he convey to another his right by will or deed? Or, if he die, will his rights descend or go to his legal or personal representatives? Clearly not. If, then, no member has any right which he can buy or sell, or bequeath or transmit, can his right in any sense be said to be property? I think not.

If, then, the relator had no property in the sense referred to, let us turn to the *second* supposed right and see if it can be a vested right, to wit:—the right to improve the science of medicine. This is one of the objects of the society, and it may be said that membership is necessary to its accomplishment. But it is only necessary to ask the question, can this, in any possible sense, be a vested right, to have the response in the negative. The relator's right to accomplish that benevolent end can neither be increased nor diminished in or out of the society. This question, it seems to me, will not bear discussion.

But, *thirdly*, has the relator's right to charge or collect fees as a practitioner been taken away by his expulsion from the society? He neither acquired this right in entering the society, nor lost it on his expulsion. He had it before, and he has it now unimpaired.

Fourthly. Was the relator's right to meet the other members of the society in social intercourse, or even in professional intercourse, a vested right? It is true that while a member of the society he had the right to enter the society, to join in the deliberations of that body, and to do all acts incidental to its object and designs, but can this, in any sense, be called a vested right? A member of the Georgia Historical Society, for instance, so long as he deports himself in compliance with the rules established for its government and purposes, has the right to meet that body and take part in its deliberations, but it will hardly be suggested that such a right is so vested in him, as that he cannot forfeit it short of the commission of a crime. Each of these societies is eminently of a social nature; and social standing, good character,

respect of its members, harmony of action, and brotherly kindness, are essential to the accomplishment of the objects of both; and it seems just as reasonable and right that each should be vested with the power to rid itself of an objectionable member, as that either should have the right to prevent a disreputable character from acquiring membership.

But suppose the relator has a vested right in either of the four ways suggested (and I can conceive of no other possible right he or any member of this society can have), can all or any of such rights be enforced by the *writ of mandamus?* If he has a vested right in property, he can enforce that by a common-law process. His interest, if property, is ascertainable and can be recovered. But can the *writ of mandamus* compel the members of the Georgia Medical Society to return any or all of the other three supposed rights? I think not. We have already seen that the relator's right to practice his profession and collect his fees exists independent of his connection with the Georgia Medical Society; and it is not necessary, therefore, to discuss that question. But as to the *third* and *fourth* possible rights, it is to be observed that they, in my judgment, are not within the scope of the operation of the *writ of mandamus.* They are eminently and exclusively social, not to say ethical, or if you please æsthetical questions. The court might order The Georgia Medical Society to receive the relator into free membership, and yet as to these two rights of membership, to wit, social meeting and promoting the benevolent objects of the society, the court has no power to enforce its mandate. Suppose the members of the society refuse to *meet* with the relator, refuse to *discuss* medical science with him, refuse to consult with him, refuse to exert any effort, physical or mental, to carry out the purposes of the society, what power of compulsion has this court which it can bring to bear on such recusant members? The bare question shows its impracticability.

I must, therefore, refuse the *mandamus.*

The result arrived at in the foregoing case appears, so far as we gather from the facts reported, to be substantially correct, but the decision can hardly be supported on the reasoning of the opinion.

No case that we have seen has gone so far, as to say that rights of membership, even in a merely literary or social club, are not vested rights which the law will protect, and many cases have laid down with great stringency, rules which must govern the exercise of even the most unlimited discretion as to expulsion of members from societies.

The early English decisions, beginning with the famous case of *James Bagg*, reported by Lord COKE, 11 Rep. 93, were cases of amotion or disfranchisement in public or municipal corporations. In *Bagg's Case*, it was resolved by the Court of King's Bench that the power of disfranchisement could only be exercised under authority given by express words in the charter, or by prescription; and where no such express authority existed, there must be a conviction of some offence in a court of law before the offender could be disfranchised.

As corporations however grew more numerous, and their character and purposes essentially changed, it was found that this limitation of power was too narrow to meet the cases then arising, and in what may be called the second leading case on the subject, *Rex* v. *Richardson*, 1 Burr. 517, it was decided that a corporation may make a by-law giving power of amotion for just cause, though the corporation that made it had no power of amotion expressly given by charter or claimed by prescription. Lord MANSFIELD in delivering judgment said: "There are three sorts of offences for which an officer or corporator may be discharged:—

"1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise.

"2. Such as are only against his oath and *the duty of his office as a corporator*; and amount to breaches of the tacit condition annexed to his franchise or office.

"3. Offences of a mixed nature—as being an offence not only against the duty of his office, but also a matter indictable at the common law." The power of amotion, therefore, he said, was *incident to every corporation*, though the manner in which it should be exercised might differ according to the distinction made in offences. For the first class of offences a corporator can only be amoved after *conviction in a court of law;* but for the second sort, the power of *trial* as well as removal is incident to every corporation.

The reasoning and authority of Lord MANSFIELD, in *Rex* v. *Richardson*, have been followed with great uniformity in subsequent cases both in England and America, though the courts have shown a strong tendency to restrict the exercise of the power of expulsion for causes of the second class to cases of acts directly and unequivocally against the very purpose and existence of the corporation. The leading American case is *Commonwealth* v. *President of St. Patrick Benevolent Society*, 2 Binn. 441 (1810). The society was a charitable corporation, for the purpose of raising funds to assist its members in sickness, &c. By the charter it was authorized to make rules and by-laws, and to do everything needful for the good government and support of the corporation. A by-law enacted, that "vilifying any of its members" should be a crime against the society, and might be punished by expulsion. The relator was expelled for this offence. The proceedings were regular, and the case turned on the validity of the by-law. The court, by TILGHMAN, C. J., held the by-law void, on the ground that private quarrels of members were totally unconnected with the purposes of the society, and such a by-law therefore was not necessary for its good government and support, and awarded a peremptory mandamus to restore the relator.

It is very clear that the character of an act considered as an offence of the second class enumerated by Lord MANSFIELD, depends materially on the nature and purpose of the corporation itself. Money corporations properly so called, that is corporations whose primary object

is the acquisition of property or profit for its members, stand on a very different basis from those in which profit to individual members has no part, and in which acquisition of property in the corporation itself is merely incidental to its real purposes and objects. In the former, it is conceded that the power of expulsion can only be exercised under express authority derived from the charter: Angell & Ames on Corp. §§ 113, 410. But even in the latter class, the courts have uniformly treated membership as a vested right which they would protect from illegal or irregular interference. Thus, in *Fuller* v. *Trustees of Plainfield Academy*, 6 Conn. 532, it was held that the place of a trustee in an eleemosynary corporation, though no emoluments are attached to it, is yet a franchise of such nature that a person improperly dispossessed of it is entitled to redress, and a peremptory mandamus was awarded. So in *People ex rel. Gray* v. *Medical Society of Erie*, 24 Barb. 570. The medical society established a fee-bill, and provided by a by-law that any member taking a smaller fee than the one prescribed in the fee-bill might be expelled. The society had by statute the right to make by-laws regulating the admission and *expulsion* of members. The relator was expelled by the society for violation of the fee-bill, and on mandamus the court ordered him restored, on the ground that the by-law was not one within the proper powers of the society.

To the same effect are the numerous cases cited by the counsel for the relator in the principal case, and also *Evans* v. *The Philadelphia Club*, 14 Wright (50 Penn.) 107, a very interesting case, which was argued with great earnestness by very able counsel on both sides. The decision being unfortunately by a divided court, with no reasons assigned, has not the authority to which it would otherwise be entitled.

The course of reasoning, therefore, by which the learned judge in the principal case refines away the rights of the relator, cannot be considered as supported by authority, nor can the denial of the remedy by *mandamus*. It was decided by Lord MANSFIELD in *Rex* v. *Barker*, 3 Burr. 1265, that *mandamus* is the proper remedy, and this has been uniformly followed both in England and America.

The result of the adjudicated cases on the subject of amotion and disfranchisement, would seem to reduce the power of expulsion within very narrow limits. Social clubs, however, being of very recent origin, and scientific or literary societies having a social basis and character having of late grown into importance, it must be expected that the cases arising hereafter in reference to such societies cannot be fairly brought within the stringent rules in regard to expulsion of members, which have been found just and satisfactory hitherto. As the change in times and manners from Lord COKE to Lord MANSFIELD led the King's Bench to the distinctions taken between *Bagg's Case* and *Rex* v. *Richardson*, so the changes of the last century must bring the courts to a more liberal application of the principles of the latter case.

The true and solid ground on which to decide such cases is, as it seems to us, the contract of membership, liberally construed with reference to the purposes of the corporation or society. The classification of Lord MANSFIELD is sufficiently comprehensive. "Secondly," he says, "such as are against the duty of his office as a corporator; and amount to *breaches of the tacit condition annexed to his franchise.*" Whether an act be such a breach or not should be judged entirely by its effect on the society; and if by his assent to the laws and rules of the society, a member has agreed that the corporation, or any part of it, shall be the tribunal to decide the

fact, then the courts instead of being astute to discover defects of jurisdiction (as it must be confessed they have in many of the American cases), should aim liberally to support the judgment of the tribunal agreed upon.

In the latest English case on this subject, *Hopkinson* v. *Marquis of Exeter*, Law Rep. 5 Eq. 63, the complainant being a member of the *Conservative Club*, had given pledge that he would vote for certain liberal candidates at the parliamentary election, and for this he was expelled from the club. The rules of the club made no reference to the political opinions of its members, except so far as they were implied from its name. Lord ROMILLY, M. R., refused to restore the complainant, on the ground that he had submitted to the jurisdiction of the club by becoming a member, and the proceedings had been regular according to the by-laws. A club, he said, was a partnership, but of a different kind from any other; and the members had by rules constituted a tribunal for the decision of questions of membership and expulsion. "The question is, whether there is any appeal from that decision. It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord ELDON in *White* v. *Damon*, 7 Ves. 35, must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bonâ fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal."

It does not appear from the report whether the club was incorporated or not; but, putting the decision fairly on the contract of the member to abide by the judgment of the tribunal established by the by-laws, we are unable to perceive that the fact of incorporation is at all material.

If the decision in the principal case had been rested on the by-law quoted, and the regularity of proceedings under it, we think it would have stood on a basis of sound reason, and have been strictly within the *principle* of Lord MANSFIELD'S judgment in *Rex* v. *Richardson*. J. T. M.

Court of Appeals of Maryland.

NORTHERN CENTRAL RAILWAY CO. *v.* CANTON CO.[1]

Trade fixtures and buildings for trade, no matter how strongly attached to the soil or firmly embedded in it, are treated as personal property, and as such subject to removal by the person erecting them.

The road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; but under certain circumstances they may be trade fixtures, and be treated as personal property.

The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine, that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily

[1] We are indebted for the opinion in this case to the Baltimore Law Transcript.—EDS. AM. L. R.

relinquished his claim in favor of the landlord. This presumption cannot arise, where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice.

THE Northern Central Railway Company, after the year 1855, and before 1859, constructed, at its sole cost and charge, a railway track upon the lands of the Canton Company, with the license and permission of the latter. In 1859 the appellee revoked the license under which the appellant was in possession of its land. This was followed, in 1860, by two suits, one an action of ejectment, and the other of trespass *quare clausum fregit.* During the pendency of these suits, which had been referred, by agreement, to an arbitrator, the appellant filed a bill for specific performance, and also praying for an injunction. The appellee was successful in having the bill dismissed, and recovered judgment in both actions at law. A subsequent action of ejectment was brought in January 1865, for the road bed, which had not been embraced in the previous ejectment suit. A judgment thereon was obtained in June following, and under a writ of *habere facias* possession was delivered to the appellee in October of the same year. The rails and other materials which formed a part of the railway constructed by the appellant under the circumstances above stated, were upon the land at the time, and the question arises who is the rightful owner of them.

The opinion of the court was delivered by

BRENT, J.—The fact that the rails had been taken up and severed from the soil shortly before the execution of the writ of possession is immaterial. If the appellant had no title to them while attached as a railway to the soil, the severance did not confer any.

The general rule of the common law certainly is, that whatever is fixed and annexed to the soil, becomes a part of it, and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases, in which the question arose, to form an exception, no matter how strongly attached to the soil or firmly embedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes* v. *Mawe*, 3 East 38, 2 Smith's L. C. 251, the earlier and more important decisions upon this subject

are very fully reviewed by Lord ELLENBOROUGH, and his conclusion from them, that trade fixtures and buildings for trade have always been recognised as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness* v. *Pacard*, 2 Peters 137, the exception is recognised by the Supreme Court of the United States, STORY, J., delivering the opinion, and the doctrine applied to a house, which had been erected as an accessory to the business of a dairyman, although it was occupied as the residence of his family, and those employed by him. It is also recognised and asserted in *Holmes* v. *Tremper*, 20 John. R. 29; *White's Appeal*, 10 Barr 252, and authorities there cited.

Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder, and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty, or is to be treated as personal property. In the notes to the cases of *Prince* v. *Case*, and *Rerick* v. *Kern*, 2 Amer. L. C. 747, it is correctly said the American courts "have repeatedly held that a house or other building will not be merged in the land on which it stands in consequence of the solidity of its structure, or the connection between it and its foundations; if the agreement of the parties, and the purposes of justice require, that the title to both should be kept separate, and that the owner of the house should have the right to enter for the purpose of using it as his own, or removing it." In the case of *Dame* v. *Dame*, 38 N. H. 429, this doctrine was applied to a house erected upon the land of another, and it was held to be but a personal chattel. It is also established by *Curtiss* v. *Hoyt*, 19 Conn. Rep. 154; *Wells* v. *Bannister*, 4 Mass. 514; *Barnes* v. *Barnes*, 6 Verm. 388; *Pemberton* v. *King*, 2 Devereux 376, and being personalty, it is governed by the same rules as any other personal property left by the consent of the owner of other land upon his premises: *Smith* v. *Benson*,

1 Hill 176. We consider the property in dispute in this case, as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of a railway company. It certainly was not accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would, or could have been used by the appellee as a railway. The conclusion cannot be avoided, that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company as a steam-engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *The Farmers' Loan and Trust Co.* v. *Hendrickson*, 25 Barb. 484, and cited with approval in 18 Md. 193, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; *primâ facie* a house, with its foundation planted in the soil, is real property; yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The

road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management, and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

The strict rule, which has been applied to tenants requiring them to remove fixtures which they hold as personal property, during the term, even if it was adopted by this court, does not apply to the present case. The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice. To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another.

If the property replevied did not belong to the appellee at the time the license to the appellant to be upon its land was revoked, it is not perceived how the subsequent suits between them could have changed the title to it. This property was not the subject of those suits. They had reference to the land only upon which it was, and determined no question of its ownership, inasmuch as it does not pass with the realty from the single circumstance of having been affixed to the soil.

Upon a careful review of the law and facts in this case, we cannot agree with the court below. We think the property in question belonged to the appellant, and the judgment below should be reversed.

Judgment reversed, and judgment for the appellant for the property replevied, and one cent damages and costs.

The foregoing decision affords another instance of the ingenious but rather disingenuous devices of courts, in making compensation for their own errors. The true and manly course, unquestionably, would have been to hold the license to

use the land for railway purposes, after it had been executed by laying a track, as irrevocable, on the same grounds that oral contracts for the sale of land have been enforced in courts of equity. But there has been a great deal of ingenious refinement to escape from any such sensible and natural course. And the latest one is, that while any one who stands by and allows another to build *upon his own land*, to the obstruction of any incorporeal right of the person thus acquiescing, he will be precluded from thereafter interposing any obstacle to the use and continuance of such obstruction; that no such consequence follows even an express license to build on the land of another by the owner: *Dyer* v. *Sanford*, 9 Met. 395, and cases cited.

We know there is a great deal of learning expended to show the distinction between allowing such license to operate upon corporeal and incorporeal interests in land, and how the one is more in conflict with the Statute of Frauds than the other. But the truth is, that both are in direct conflict with that statute, and so is a decree of specific performance on the ground of part-performance. But if fraud will justify a court of equity in denying the perpetrator the shield of an express statute in one case, it certainly will in all cases. And the refusal to extend it to all analogous cases, as is done in making this distinction between licenses executed upon the land of the licensor and that of the licensee, is without any just foundation, or ground to stand upon. And the same rule has been extended to a license executed on the land of a third party, which was held irrevocable: *Curtis* v. *Noonan*, 10 Allen 406. The distinction is here made between *acquiring* and *abandoning* an easement in land; that the one cannot be done by oral license, but the other may be. But the distinction is rather thin and shadowy. An existing easement in land can only be regarded as an interest in the realty, and of equal importance only with one of equal extent to be thereafter created. The former cannot be abandoned by the owner without passing to some other, not perhaps as a distinct easement, but as an interest in the land. The absolute owner of land is no more affected in his title by the creation of an easement in the land, than he is by the destruction of the same easement thereafter; so that it is allowing ourselves to be cheated by a very thin disguise to affect to believe, that the creation of an easement in land by parol, is any more in conflict with the Statute of Frauds than its abandonment.

And the calling a railway a temporary fixture for the purposes of trade, is better than no redress in so palpable a wrong as the present case presents; but, after all, it is curing one blunder by another scarcely less flagrant. But we admit it is better than no remedy. We would go back and find where the train first left the track, and there apply the cure. I. F. R.

Supreme Court of Iowa.

HAWLEY v. HUNT.

State insolvent laws have no extra-territorial operation: and a creditor cannot be compelled by a state of which he is not a citizen or resident to become a party to insolvent proceedings therein; and such proceedings cannot discharge a debt due to a non-resident creditor, unless he voluntarily submits to the jurisdiction by becoming a party to the proceedings, or claiming a dividend thereunder.

A non-resident and non-assenting creditor is not bound by a debtor's discharge under state insolvent laws, no matter where the debt originated, or is made payable: *citizenship* of the parties governs, and not the *place* where the contract was made or where it is to be performed.

This rule applies to a case where a non-resident creditor has recovered judgment against his debtor in the state where the latter resides; and also to the case where the judgment has been assigned to a non-resident creditor and notice given to the debtor, before the latter commenced proceedings to obtain his discharge.

The history of the Federal and state adjudications on the subject of the effect of discharges under state insolvent laws, examined by DILLON, C. J.

APPEAL from Jackson District Court.

The plaintiff sued on two judgments rendered against the defendant in New York. The defence relied on was a discharge of the defendant under the insolvent law of that state.

In 1854, two judgments were rendered against the defendant in the Supreme Court of New York. The defendant was at that time a resident and citizen of that state. Those judgments (as would appear from copies of the complaints), were rendered upon promissory notes executed by the defendant respectively to one Pierce (who assigned the note to one Rulsion), and to one Thomas. Where the notes were executed did not otherwise appear than by averment in the complaints in the actions in New York, that one of the notes was executed at "Denmark," and the other at "Gouverneur," but in what state was not alleged. Of what state Rulsion and Thomas, who recovered the judgments in New York against the defendant, were citizens, did not appear.

In 1856, the defendant removed from New York and *became a resident of Iowa*, and was a resident of Iowa at the time of the commencement of the present action, and at the time the judgment therein was rendered in his favor, from which the plaintiff prosecutes the present appeal. In 1860, one of the judgments obtained in New York against the defendant was assigned by the

judgment-plaintiff to Hawley, the plaintiff in the present action, *then and now a resident and citizen of Iowa.*

In 1861, the other judgment was likewise assigned to Hawley.

In 1862, Hawley commenced the present action on the above-mentioned judgments against the defendant in the District Court of Jackson county, Iowa (defendant being a resident of that county), and obtained personal service of process upon him. Defendant appeared, and in March 1862, filed an answer, admitting the rendition of judgment against him in New York as alleged, and pleaded payment, &c. The cause was continued from time to time, until, in March 1865, an amended answer was filed, in which the defendant alleged that "on the 3d day of August 1863, he was duly discharged from all his debts under the statute of the state of New York, providing for the discharge of insolvents." A copy of the discharge was annexed to the answer. The certificate of discharge was dated on the 3d day of August 1863, and the officer, after reciting the proceedings, declares that "he does hereby discharge the said insolvent from all his debts and from imprisonment, pursuant to the provisions of the statute."

The foregoing facts were uncontroverted. On the trial the plaintiff maintained that the defendant was not a resident of New York at the time he applied for and obtained a discharge under the insolvent law of that state. This the defendant denied, and on this issue both parties introduced evidence.

A jury was waived and the cause tried by the court, which gave judgment for the defendant. The plaintiff appealed.

C. M. Dunbar, for appellant.

W. E. Leffingwell, for appellee.

The opinion of the court was delivered by

DILLON, C. J.—Respecting the validity of discharges under state insolvent laws, where the creditor is a non-resident of the state granting the discharge, there has been much discussion, much conflict of view, and, until quite recently, on some points much doubt.

But in view of the authoritative adjudications of the Supreme Court of the United States, presently to be referred to, and of the leading decisions of the state courts, cited below, the law, so

far as relates to the present case, may be stated in a single sentence.

The settled doctrine now is, that a debt attends the person of the creditor, no matter in what state the debt originated or is made payable; that a creditor cannot be compelled by a state of which he is not a citizen or resident, to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential; that notice is requisite to jurisdiction in such cases, and can no more be given in insolvent proceedings than in personal actions where the party to be notified resides out of the state, and hence a discharge under a state insolvent law will not and cannot discharge a debt due to a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceeding, or claiming a dividend thereunder.

As direct authority for this statement of the law, we refer to the following decisions of the Supreme Court of the United States: *Baldwin* v. *Hale*, 1 Wallace 223, 1863; s. c. 3 Am. Law Reg. (N. S.) 462, and note by Judge REDFIELD; *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 348; *Cook* v. *Moffat*, 5 How. 310; *Suydam et al.* v. *Broadnax*, 14 Pet. 75.

See also the following cases and authorities: *Donnelly* v. *Corbett*, 7 N. Y. (3 Seld.) 500; *Felch* v. *Bugbee*, 48 Maine 9; s. c. 9 Am. Law Reg. (O. S.) 104; *Beers* v. *Rhea*, 5 Texas 349; *Poe* v. *Duck*, 5 Md. 1; *Anderson* v. *Wheeler*, 25 Conn. 603; *Crow* v. *Coons*, 27 Mo. 512; *Pugh* v. *Bussel*, 2 Blackf. 394; *Beer* v. *Hooper*, 32 Miss. 246; *Woodhull* v. *Wagner*, Baldw. C. C. Rep. 300; *Byrd* v. *Badger*, 1 McAll. 263; *Springer* v. *Foster*, 2 Story 387; 2 Story Const., § 1390; Confl. Laws, § 341; 2 Kent Com. (9 ed.) 503; *Kelly* v. *Drury*, 9 Allen 27, 1864.

I have said that the settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or is made payable. In other words, the *citizenship* of the parties governs, and not the *place* where the contract was made, or where it is to be performed.

It is perhaps desirable to trace briefly the line of decision leading to and establishing the doctrine as above stated.

Respecting state insolvent laws the controlling constitutional provision is, that "no state shall pass any law impairing the obligation of contracts."

"Any law," to use the language of Mr. Webster, in his argument in *Ogden* v. *Saunders*, 6 Webs. Works 26, impairs the obligation of a contract *which discharges the obligation without fulfilling it.*"

In *Sturgis* v. *Crowninshield*, 4 Wheat. 122, the Supreme Court of the United States held such laws to be invalid as to pre-existing contracts. Subsequently the great case of *Ogden* v. *Saunders*, 12 Wheat. 213, came before the court. Respecting just what that case decided there has been much difference of opinion; but these differences have been set at rest by the later decision in *Baldwin* v. *Hale*, before cited.

In *Ogden* v. *Saunders*, one point ruled or declared was, that a state insolvent law or bankrupt law was not a law impairing the obligation of contracts as respects debts contracted *after* the enactment of such law. This was upon the ground, largely if not wholly, that every contract made in a state must be taken to have relation to the existing law of the state which becomes, so to speak, a part of it, attached to it and attendant upon it; and since the insolvent law declares a right on the part of the debtor to be discharged from contracts thereafter made on certain terms, whoever becomes interested in such contracts takes them subject to this right, and the exercise of such right cannot be said to impair the obligation of the contract. It was this point in the case which has been the cause of much controversy in the state courts. In his argument Mr. Webster combated with great force the proposition "that the law itself was part of the contract, and therefore cannot impair it:" 6 vol. Webs. Works, 29.

At present we have no occasion to enter upon a discussion of this vexed proposition—the Supreme Court asserted that a state bankrupt law was not invalid as respects *subsequent* contracts. And the point ruled in *Ogden* v. *Saunders*, was that a state insolvent law cannot affect the rights of creditors who are citizens of other states.

The second opinion of Mr. Justice JOHNSON (12 Wheat. 258), says Judge CURTIS (Digest, p. 114, § 4), was concurred in on the general question and settled the law involved therein. (On this

point see also, *Boyle* v. *Zacharie*, 6 Pet. 348, 643; *Cook* v. *Moffat*, 5 How. 310; *Baldwin* v. *Hale*, *supra*, per CLIFFORD, J.)

The principle of the decision in *Ogden* v. *Saunders*, as stated by Mr. Justice JOHNSON, is, "that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; *as against citizens of other states, it is invalid as to all contracts.*"

In *Cook* v. *Moffatt*, 5 How. 309, the leading case of *Ogden* v. *Saunders* was reviewed, the soundness of many of the reasons assigned in former opinions questioned, but the court held, among other points, that "a certificate of discharge under an insolvent law will not bar an action brought by a citizen of another state on a contract made with him;" that state insolvent laws "can have no effect on contracts made before their enactment, *or beyond their territory.*" This language, it will be seen, is not free from uncertainty, and does not necessarily exclude the notion if a contract is made originally between citizens of a state and *is to be performed there*, and a non-resident subsequently becomes interested in or the owner of such contract (for example, a bill of exchange), he shall not be bound by a discharge granted in pursuance of a state law in existence at the time when the contract was made. The Supreme Court of Massachusetts, admitting its duty to follow what was *decided* on this subject by the Supreme Court of the United States, held that even as between citizens of different states, a state insolvent discharge was effectual *in cases where it appears by the terms of the contract that it was made and to be performed in the state granting the discharge.* This was in *Scribner* v. *Fisher*, 2 Gray 43, Mr. Justice METCALF *dissenting*. This decision was followed in other cases in that state which, without reargument, were rested upon it.

In *Demeritt* v. *Exchange Bank*, 10 Law Rep. 606 (March 1858), Mr. Justice CURTIS, then of the Supreme Court of the United States, in express terms denied the correctness of *Scribner* v. *Fisher*, stating that it was in conflict with *Ogden* v. *Saunders* and *Boyle* v. *Zacharie*. "It is urged," says Judge CURTIS, "that where the contract is *to be performed in the state* it is not within *Ogden* v. *Saunders*. It has been so held in *Scribner* v. *Fisher*, 2 Gray 43. But I cannot concur in that opinion. I consider the settled rule to be that a state law cannot discharge or suspend the

obligation of a contract, though made and to be performed within the state, where it is a contract with a citizen of another state."

In *Donnelly* v. *Corbett*, 7 N. Y. (3 Seld.) 500, 1852, the Court of Appeals of New York; in *Felch* v. *Bugbee*, 48 Me. 9, s. c., 9 Am. Law Reg. (O. S.) 104, 1860, the Supreme Judicial Court of Maine; in *Anderson* v. *Wheeler*, 25 Conn. 607, the Supreme Court of Connecticut, and in *Doe* v. *Puck*, 5 Md. 1, the Supreme Court of Maryland, and there are other similar decisions, decided that the distinction taken in *Scribner* v. *Fisher* was unsound, and that state insolvent laws had no extra-territorial effect so as to operate upon the rights of citizens of other states.

But in *Baldwin* v. *Hale*, before cited, the Supreme Court of the United States, in 1863, in terms and by name declared *Scribner* v. *Fisher* to be in conflict with the settled rule of that court. Mr. Justice CLIFFORD, after reviewing the prior decisions and stating the points ruled, says: "But a majority of the court held in *Scribner* v. *Fisher* that if the contract was to be performed in the state where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another state and had not in any manner become a party to the proceedings. Irrespective of authority it would be difficult, if not impossible, to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard, and in order to be heard they must first be notified. Common justice requires that no man shall be condemned without notice and an opportunity to make his defence. Courts of one state have no power to require citizens of other states to become parties to insolvent proceedings. * * * Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and, of course, there can be no legal default."

Independent of its authoritative force, this decision and the grounds upon which it is placed, command unqualified approval. Certain it is, that it is the final and settled doctrine of the Supreme

Court of the United States, with respect to a question of which that tribunal is the ultimate arbiter.

Subsequently, the Supreme Court of Massachusetts, in *Kelly* v. *Drury*, 9 Allen 27, following the decision in *Baldwin* v. *Hale*, itself overruled *Scribner* v. *Fisher*.

The Supreme Court of the United States having thus settled that a citizen of another state cannot be affected by an insolvent discharge in the state in which the debtor resides, even though the contract was made and on its face is to be performed therein, that principle settles this case, and shows that the judgment of the District Court was erroneous on the undisputed facts before it.

Those facts were that the judgments sued on were rendered against the defendant in New York; that he afterwards removed to and became a citizen of Iowa; that both plaintiff and defendant were citizens of this state at the time when the judgments were assigned to the plaintiff, at the time the latter brought suit, and at the time the judgment was rendered which is now appealed from.

The discharge was no bar to the plaintiff's action, even though it be admitted that the defendant concluded to remain in New York, and in good faith applied for this discharge as a citizen of that state.

The assignment of the judgments to the plaintiff made him the owner of them and of the debts of which they were the record evidence. He was as much the owner as if they had been recovered in his name. Our statute recognises the plaintiff as the owner, and allows him to sue thereon in his own name. The defendant had notice of the assignment. He owed the debt, and owed it to the plaintiff. He could not afterwards pay to the assignor, or to any person but the plaintiff.

Both parties *being citizens of Iowa*, and the plaintiff having actually brought suit in Iowa to collect his debt, the plaintiff, though suing upon a New York judgment, was an Iowa creditor, and the defendant would have no more right, as against the plaintiff, subsequently and pending the action, to remove to New York, acquire a discharge which should be valid as against the plaintiff's action in Iowa, than if the defendant had never previously resided in New York, or had while residing there made the contract with the plaintiff at the time a resident of Iowa.

I need not stop to point out the injustice and unreasonableness

of holding that a debtor, pending an action against him, may change his residence, obtain an *ex parte* discharge, resume his residence in the state in which his creditor resides, and then be allowed to plead such discharge as an effectual bar to the plaintiff's action.

The court of no state could, in justice to its citizens, ever give its sanction to such a doctrine, unless it conceived that it was so bound down by authority that it could not unloose itself from its grasp.

The court below undoubtedly proceeded upon the idea of the Supreme Court in Massachusetts in *Scribner* v. *Fisher*, and counsel undoubtedly did not call its attention to the case of *Baldwin* v. *Hale*, since it is not referred to in their briefs in this court.

It was suggested on the argument that the court of New York would have control over judgments rendered in that state, and that the case was or might be different from what it would if the contracts on which the judgments were rendered had been transferred to the plaintiff, a resident of Iowa, and had never been reduced to judgment in New York.

The decisions in this court (*Burtis* v. *Cook & Sargeant*, 16 Iowa 194) treat a judgment rendered as a chose in action. It is a debt, or the record evidence of a debt. The plaintiff, as the assignee, has the same rights as if he had, while a citizen of Iowa, recovered judgment in his own name in New York. In that case it is plain that it could not be discharged against his assent, by a state insolvent proceeding. This suggestion comes right back to the point before discussed and which has been finally set at rest by *Baldwin* v. *Hale*, viz., that if the creditor is a non-resident of the state a discharge under a state law cannot affect him unless he voluntarily becomes a party to the proceeding, and this is the case irrespective of where the contract was entered into or was to be performed.

Place of making or place of performance is utterly immaterial in all cases where the creditor is not a citizen of the state granting the discharge. *Citizenship of the parties*, and not the place of the making or the place fixed for the performance of the contract, is the controlling element.

As the plaintiff was undoubtedly a citizen of Iowa at the time the defendant obtained his discharge in New York, it is not necessary to decide the question, so warmly debated by counsel, whether

the defendant did in fact acquire a residence in New York at the time he applied for relief under its insolvent laws. To my mind this is doubtful, but as the evidence is conflicting and by no means decisive, we ought not on this ground to disturb the judgment of his Honor below. This has made it necessary to dispose of the case on the assumption that the defendant was not a citizen of Iowa, but was a citizen of New York when he applied for his discharge.

Judgment reversed.

Supreme Judicial Court of Maine.

ELBRIDGE W. ROBINSON *v.* WARREN WEEKS.

The contracts of infants are:—

(1). Binding—when for necessaries at fair rates;

(2). Void—when manifestly and necessarily prejudicial; and

(3). Voidable, at the infants' election, either during minority or within a reasonable time after attaining majority: including all executory agreements not for necessaries, and all executed contracts of this sort wherein the other party can be placed substantially *in statu quo*.

Mere receipts for money paid for stock in a petroleum company, being for no appreciable value, need not be returned by a rescinding infant before the commencement of his action for the recovery of money thus paid.

ASSUMPSIT for money paid for stock in an oil company.

The plaintiff was born October 31st 1845. On March 3d, and April 18th 1866, the plaintiff paid the defendant $200, and received therefor only two receipts, one signed by the defendant and the other by the defendant's agent, of the following tenor: "Received of E. W. Robinson, one hundred dollars for one-half of his share in the Mt. Vernon Land and Petroleum Co." On November 12th 1866, the plaintiff repudiated the contract, demanded of the defendant the money paid, and offered to assign to him all interest he might have in the company; but did not offer to return the receipts.

Kempton, for the plaintiff.

S. Belcher, for the defendant.

BARROWS, J.—If the receipts which the defendant and his

agent gave for the money which the plaintiff seeks to recover in this action, could be considered as certificates of petroleum stock, the action could not be maintained; for assuredly, if an infant has received anything which may have an intrinsic or a market value, by virtue of the contract which he claims to rescind, he must return it, if it is in existence and within his control after he becomes of age, before he can be permitted to reclaim the money paid for it. It is unnecessary, in this case, to define more carefully or precisely the limitations of this obligation on the part of a rescinding minor to return what he has received under the contract, or to consider further the effect of failure or inability to return anything which has such a value; for the plaintiff was of age and had the receipts in his possession when he claimed to rescind, but did not offer to return them.

But these receipts were of no appreciable value to any one except to the plaintiff as evidence of the fact that he had paid his money for the defendant's promise of a share in the Mt. Vernon Land and Petroleum Company. He never received any certificate of stock. The receipts gave him no legal interest in the company property if there was any. At most they gave him only a right to call upon the defendant for a share of the stock; and that right he renounced in writing as soon as he became of age, coupling with his renunciation an offer to assign over to defendant any interest which he might have in the company. The return of the scraps of paper on which the receipts were written was, under such circumstances, unnecessary.

The plaintiff was a minor when he made the agreement for the stock and paid the money. Making known his election to rescind the agreement and reclaim his money within a fortnight after he became of age and before he had received anything by way of consideration except these papers, he demands his money and brings this suit. Is there any good reason, upon principle or authority, why he should not provail?

The defendant's position receives countenance from some passages in the text-books.

In Chitty on Contracts (6th Am. ed.) 154, we find the following: "An infant's right to elect whether he will avoid or confirm a contract entered into by him during his infancy, does not necessarily entitle him to recover back money which he has paid thereon. It is indeed a general rule that an infant cannot recover back

money paid by him, even upon a contract which by reason of his infancy he is not bound to complete, there being no imposition."

And Parsons lays it down very broadly, thus: "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover the money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained by fraud:" 1 Pars. on Contracts (ed. 1853) 268.

The origin of this doctrine is to be found in a *dictum* of Lord MANSFIELD, in the celebrated case of *The Earl of Buckingham* v. *Drury*, 2 Eden 60. One of the questions in that case was whether an infant could, by contract, bar her dower. When the case came before the House of Lords upon appeal, the opinion of Lord NORTHINGTON that the statute applied only to adults was reversed, and Lord MANSFIELD, in delivering the opinion, said: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again." This doctrine was quoted to support the decision in *Holmes* v. *Blogg*, 8 Taunt. 508. But it was uncalled for in that case, the pure doctrine of which is that a minor cannot recover money paid on a valuable consideration which he has partially enjoyed, when he cannot put the other party in the same position as before; and in *Corpe* v. *Overton*, 10 Bing. 252, while the decision in *Holmes* v. *Blogg* was sustained, the *dictum* of Lord MANSFIELD, and the "strong expressions" in the later case, were reviewed and substantially overruled; and it was held that the plaintiff might recover back, "in an action for money had and received, a sum which, while an infant, he had paid in" advance towards the purchase of a share in defendant's trade, to be forfeited if the purchase was not completed when it appeared that he, on arriving at the age of twenty-one years, had refused to complete the purchase.

The *dicta* of the learned judges in *The Earl of Buckingham* v. *Drury*, and *Holmes* v. *Blogg*, *ubi supra*, seem to have been followed in *McCoy* v. *Huffman*, 8 Cowen 84; *Weeks* v. *Leighton*, 5 N. H. 343; and *Harney* v. *Owen*, 4 Blackf. 337; and thus far they do not seem to have been eliminated from the text-books, but they have been practically rejected not only in *Corpe* v. *Overton*, above cited, but by many courts in cases where the question has arisen whether an infant, who has engaged to labor for a certain period, and after performing part of the work, has rescinded the

contract, can recover for the work he has done. So that Parsons, *ubi supra*, while remarking that "the principle upon which the rule is founded that forbids the infant's recovery of money advanced by him on a contract which he has rescinded, would appear to lead to the conclusion that he could not recover for work done" under such circumstances, admits that the weight of authority is the other way. See *Judkins* v. *Walker*, 17 Maine 38; *Moses* v. *Stevens*, 2 Pick. 332; *Vent* v. *Osgood*, 19 Id. 572; *Thomas* v. *Dike*, 11 Verm. 273; *Peters* v. *Lord*, 18 Conn. 337; *Medbury* v. *Watrous* (overruling *McCoy* v. *Huffman*), 7 Hill 110; *Whitmarsh* v. *Hall*, 3 Denio 375; *Lufkin* v. *Mayall* (overruling *Weeks* v. *Leighton*), 5 Foster 82; *Wheatley* v. *Miscal*, 5 Porter (Ind.) 142. Thus it will be observed that all the principal cases where these *dicta* have been followed, have been reconsidered and overruled by the courts in which they were decided. It is true that in *Breed* v. *Judd et al.*, 1 Gray 455, the right of the minor to rescind an executed contract was made to depend not upon the character of the contract, but upon the finding of the jury, that the consideration by him received was not only adequate but beneficial. That case is apparently in conflict with *Tupper* v. *Cadwell*, 12 Met. 559, which holds, we think rightly, that what subjects of expenditure are to be termed beneficial to the infant is a matter of law to be decided by the court.

We think the true doctrine is, that the contracts of minors may be divided into three classes: (1) binding—if for necessaries at fair and just rates; (2) void—if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment, or the like; (3) voidable—at the election of the minor, either during his minority, or within a reasonable time after he becomes of age; and this last class includes all the agreements of a minor, which may be beneficial (and are not for necessaries), until fully executed on both sides,—and all executed contracts of this sort where the other party can be placed substantially *in statu quo*. How far executed contracts where the other party cannot be placed in as good a position as before must be excepted, and the power of the minor to avoid them denied, it is not necessary here to discuss.

The mere fact that the contract has been fully executed, or that the infant has paid the money with his own hand, does not necessarily affect his right of rescission and recovery: *Williams* v.

Brown, 34 Maine 594; *Austin* v. *Gervas*, Hobart 77; *Price* v. *Furman*, 1 Williams (Vt.) 268.

The protection which the law supposes the infant to need is as much required against the improvidence which has paid out, as against that which only promises to pay; and where it can be afforded without converting the shield into a sword, it should be given. There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be.

In this case, the contract being legally rescinded, the rights of the parties are the same as if none had been made. He who makes a contract of this class with a minor, assumes the risk of a rescission. The money must be repaid with interest from the date of its receipt.

Defendant defaulted.

KENT, DICKERSON, DANFORTH, and TAPLEY JJ., concurred.

Supreme Court of Wisconsin.

JAY C. AKERLY, RESPONDENT, *v.* L. B. VILAS, APPELLANT.

An order of an inferior state court under the Act of Congress for the removal of a cause to a United States court, is reviewable by the Supreme Court of the state, and an appeal to such Supreme Court suspends the vesting of jurisdiction of the case in the United States court until the determination of the appeal.

The Act of Congress provides for the removal of a cause *before trial* if an action at law or *before final hearing*, if a suit in equity, and after a judgment in the inferior court it is too late to remove the cause, although the judgment may be reversed by the Supreme Court of the state, and a new trial or hearing ordered.

THIS was an appeal from an order of the Dane Circuit Court, sending the case to the United States Circuit Court for the District of Wisconsin.

The opinion of the court was delivered by

PAINE, J.—The application for removal was made by the plaintiff under the Act of Congress of March 2d 1867, and the appellant claims that the order was erroneous upon two grounds: 1st. That the case was not within the act; 2d. That if it were within it, the act itself, so far as it professes to authorize a non-resident plaintiff who had commenced his suit in the state court to obtain removal, is invalid.

The respondent's counsel have declined to argue either of these questions, but have contented themselves with simply submitting and briefly

discussing the proposition that this court has no jurisdiction to hear and determine this appeal. Of course, this question must be determined upon the hypothesis that it is possible that the case may not have been within the Act of Congress, and that even if within it, the act may have been invalid. Counsel assume this possibility, for they say that the appellant's remedy "(if indeed he has any) is to apply to the Federal court to remand the case to the state court."

In support of the position they refer to two classes of authorities. But these wholly fail to sustain it, and in truth warrant directly the opposite conclusion. And it would seem impossible to have drawn any such inference from them, except by confounding the distinction between the two classes, and applying the doctrines of both indiscriminately to each. Thus they first refer to several cases, holding that where a proper application for a removal is made, in a case where the party is entitled to a removal by law, the jurisdiction of the state court ceases, and every subsequent step, except that of sending the case away, is *coram non judice* and void. They next cite another class, holding that where the order of removal was improperly made, in a case where the party was not entitled to it, an application may be made to the Federal court to dismiss it for want of jurisdiction, and they then seek to transfer to the latter class of cases the doctrines of the former, and to hold that the jurisdiction of the state court ceases, and every step subsequent to the application for removal is equally as unauthorized and void in those cases where the order for removal is improper and the party not entitled to it by law, as in the others.

Such a conclusion is in conflict with both classes of cases. Both proceed upon the express assumption that it is only when the removal is authorized by law, and the application properly made, that the jurisdiction of the state court is divested, and that of the Federal court attaches. Both proceed upon the assumption that where this is not the case, the jurisdiction of the state court remains, and the Federal court acquires none whatever. And yet we are now asked to hold, that although this case may have been one of the latter class—though it may be one in which there was no law authorizing a removal, and in which, consequently, the Federal court acquired no jurisdiction, yet that by some unaccountable process the state court lost it, so that between the two the jurisdiction has lapsed entirely. Such a conclusion would be extraordinary indeed, and it has as little support in authority as it has in reason.

If there was no law authorizing the removal, and there was none if either of the positions taken by the appellant is true, then the jurisdiction of the state court remained unimpaired, and there was no obstacle in the way of its exercise except the erroneous order that the case be removed. And the idea that the appellate power of the state court cannot be invoked to correct this error—that it remains in abeyance, suspended by such an unauthorized application, that the court which has jurisdiction must decline to exercise it, until the court that has none shall see fit to disclaim it—is one that cannot be supported upon any reasoning.

But if the right to appeal exists in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and deter-

mine the appeal, cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed.

Nothing is better settled in legal practice, than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the express provision of our statute that allows an appeal from any order which prevents a judgment from which an appeal might be taken. It is the common practice of all courts. The case of *Mayer* v. *Cooper*, 6 Wallace 247, cited by the respondent, is one where the Supreme Court of the United States reviewed such an order, made by the United States Circuit Court. It is true in that case the order or judgment of dismissal was reversed, the court holding that the Circuit Court had jurisdiction. But if they had held differently, they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice. And this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely the decision upon that application itself. And that decision, whether the power be exercised by a subordinate or appellate court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the necessity of the case, has the power to determine whenever presented.

And whoever invokes the exercise of this power on the part of a subordinate tribunal of the state, must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence, and one of those conditions is that an order made upon such an application is appealable.

That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson* v. *Leland et al.*, 22 How. U. S. 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate court, and the chief justice delivered the opinion of the court, "that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal." The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal was wholly independent of the actual jurisdiction of the lower court, to try the action upon its merits. And if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed the state court is divested by the presentation of a proper application for removal. It is true that if the appellate court should sustain the jurisdiction of the state tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction had ceased or continued is not an exercise of it, any more when made by the appellate than it was when made by the subordinate court.

Indeed, the right and the duty of the state courts to exercise such appellate power has been expressly decided by the Supreme Court of the

United States, in *Kanouse* v. *Martin*, 15 How. 198. The Court of Common Pleas in the City of New York had denied an application for removal, and afterwards proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the Superior Court, which affirmed the judgment. And the Supreme Court of the United States reversed that judgment, not on the ground that the Superior Court erred in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the Common Pleas for refusing the application for a removal. They say: "The error of the Superior Court was, therefore, an error *occurring in the exercise of its jurisdiction*, by not giving due effect to the Act of Congress under which the plaintiff in error claimed," &c. And it made an order remanding the case to the Superior Court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the Superior Court to reverse the judgment of the Common Pleas.

And yet we are referred to this case by the respondent's counsel to support their assertion, that this court will "stultify itself by taking jurisdiction of this appeal."

This court certainly is not oblivious of the fact, that if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment after such further trial as may be necessary, the Supreme Court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse* v. *Martin*, as counsel suggest. But we feel very confident that if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal.

I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon* v. *Longest*, 16 Pet. 104, cannot in any event be applicable to the exercise of such appellate power. But it is perhaps doubtful whether the same language would be now used by that court. The subsequent case of *Kanouse* v. *Martin* seems studiously to avoid it, and makes no suggestion that the judgment of the Court of Common Pleas, and of the Superior Court were void for want of jurisdiction, but speaks of them throughout the opinion as merely "erroneous." And the same view is also supported by the case of *Hadley* v. *Dunlap*, 10 Ohio St. 1.

I come, therefore, to the conclusion that this order is appealable, and that it is a duty of this court from which it cannot shrink to proceed to a determination of the questions presented.

Was the case within the provisions of the Act of Congress? The act provides that the non-resident party to a suit in a state court, between a citizen of that state and a citizen of another state, shall be entitled to a removal, on making the proper application, "at any time before the final hearing or trial of the suit." The question arises upon this language: Was the application here made "before the final hearing or trial," in accordance with its intent and meaning?

What was its intent? I think it will not be claimed that the word "final," as used in this provision, applies to or qualifies the word "trial." The word "hearing" has an established meaning as applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law; and the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory. This use and meaning of the words, is too well established and too familiar to require reference. I assume, therefore, that the meaning of the statute is the same as though these words were transposed, and it provided that the application might be made at any time "before trial or final hearing," and that no implication can be raised by attempting to apply the word "final" to the word "trial;" that Congress intended to distinguish between those trials which might only partially dispose of the case, and such as might occur afterwards, and to allow this right of removal so long as any question yet remained to be tried, in order to the complete disposition of the suit. It will be observed that in the Act of 1866, of which this is amendatory, the words were so transposed, and the application was required to be made "before trial or final hearing;" and their transposition in the present statute was evidently merely casual, not designed to effect, and not effecting any change whatever in their meaning. The obvious intention of the statute was to require the party desiring to apply for a removal to do so before trial in actions at law, and, what is the same thing, before final hearing in actions in equity. The reason and justice of this, if a removal is to be allowed at all, are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice to give him the right to experiment upon the decisions of the state tribunals, obtaining those which if in his favor would be binding and conclusive upon the other party, but which if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong, but on the contrary clearly designed to exclude the possibility of it, by requiring the application to be made before trial or final hearing. It seems clear, therefore, that whenever in any state court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication, which upon the principles governing judicial decisions would be final between the parties, as to any portion of the merits of the action, the case has passed beyond the stage when it was within either the letter or the spirit of the law.

How was it with this suit in that respect? It was an equitable action brought in 1860 to foreclose a mortgage in the Circuit Court of Dane county. The defendant, in accordance with the practice prevailing in this state, interposed by way of defence certain counter claims, growing out of and connected with the transactions in which the mortgage originated.

To these there was a demurrer by the plaintiff, which was overruled, and the order overruling it was affirmed on appeal to this court. Various proceedings were subsequently had, and the case was then brought to final hearing, and a decree rendered in favor of the defendant, dismissing the complaint. That was reversed on appeal to this court, and another final hearing was had in which the plaintiff obtained a judg-

ment. That was reversed by this court and the cause remanded for further proceedings; and at that stage of it this application for a removal was made. It will be seen, therefore, that instead of being made before final hearing, it was not made until after there had been two final hearings. And it is no solecism to speak of two final hearings in an equity case, any more than it is to speak of two trials in an action at law.

It is material then to consider what was the effect of the several decisions of this court in respect to the rights of the parties as to the matters involved in them. No doctrine is better settled here than that the matters decided become *res adjudicata;* those decisions became the law of the case, binding upon the parties, binding on the subordinate court, and disposing finally of the questions decided. Whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open: *Luning* v. *The State*, 1 Chand. 264; *Parker* v. *Pomeroy*, 2 Wis. 112; *Downer* v. *Cross*, Id. 371; *Cole et al.* v. *Clark*, 3 Id. 323; *Jones* v. *Reed*, 15 Id. 40.

If this rule were peculiar to this state, still the decisions of this court would govern, as to the effect of our own judicial proceedings between the parties. But the same rule prevails everywhere; and it has been asserted by the Supreme Court of the United States quite as strongly as by any other tribunal. In *Martin* v. *Hunter (Lessee)*, 1 Wheat. 304, counsel raised a question as to the propriety of a former decision, the case having already been before the court on a former writ of error. On page 355, the court say: "In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." So it was held that the same rule prevailed in equity, and that a second appeal to that court, brought up only the propriety of the proceedings in the court below, subsequent to the mandate on the first: *Hopkins* v. *Lee*, 6 Wheat. 113. In *Ex parte Sibbald*, 12 Pet. 492, that court said, "a final decree in chancery is as conclusive as a judgment at law. Both are conclusive of the rights of the parties thereby adjudicated." See also *Bridge Co.* v. *Stewart*, 3 How. 413; *Roberts* v. *Cooper*, 20 Id. 480.

It appears, therefore, that by the principles universally recognised as applicable to the effect of judicial proceedings, there had been several trials of this case, both in the subordinate and appellate courts of this state, and several judgments by the latter, which, so far as our judicial system is concerned, were final and conclusive between the parties, as to the questions decided.

It is true those judgments did not finally dispose of the case. But that fact does not at all impeach their finality as to the matters disposed of by them. There are few important cases but what are carried more than once into the appellate courts. But the fact that the judgments of those courts do not in the first instance completely dispose of the

case, has never been supposed to annul their effect entirely, and to place the case, when it got back into the subordinate court, precisely as it would be if there had never been any trial or appeal whatever. On the contrary, as the authorities above referred to fully show, when the case gets back into the inferior court, it carries with it the judgment of the superior as the established law of the case, and no questions are open to further examination except those which that judgment has left open.

A trial or final hearing consists of the examination and determination both of questions of fact and law. In equity cases the court may determine both. On appeal this court may determine both. But the case may have been so presented that we could only properly determine the questions of law, leaving a further trial upon a part or all of the facts necessary for a complete adjustment of the controversy. This was true in this suit. The struggle in the case was upon the questions of law growing out of the defendant's counter claims. Those questions were fully considered, and finally decided on the last appeal to this court; and the case was remanded for such further trial upon the questions of fact, as was necessary to its final determination. And yet after all these years of litigation, these repeated hearings and judgments both of the subordinate and appellate courts of this state, it is now claimed that this application for a removal was made "before trial or final hearing." If such had been the intention of Congress, I cannot think it would have stopped where it did. If it would set aside and destroy the effect of repeated trials and judgments, why hesitate before the last one? If it would intervene after all the most important questions in the case had been tried and passed into judgments, binding and conclusive on the parties, why pause before the fact that some question, perhaps a minor and unimportant one, still remained to be tried, in order to a complete disposition of the case? When tried, the judgment concerning it could be no more final, no more binding, than the previous judgments had been, as to matters involved in them. Hence, if they were to be overthrown, why not overthrow the whole, and allow the party to remove his case, and try it anew in a court of original jurisdiction, after it was finally and wholly disposed of by the judgment of the state court? There could be no greater objection to the justice of such a law, than there is to it as it now stands, if it is to have the effect contended for. If the effect of two trials and judgments in all the state courts was to be annulled, there could be no reason why the same thing should not be done as to three or any other number necessary to dispose of the case.

But the act furnishes no evidence of such intention. On the contrary, both its letter and spirit exclude it. The law had formerly allowed only non-resident defendants to apply for a removal. And they were required to be prompt, and to make their election at the outset, and before taking any steps which could be construed into a voluntary submission to the jurisdiction of the state court. This act designed to extend the right to non-resident plaintiffs as well. It designed to extend the time, so that the application might be made at any time before trial or final hearing. But it did not design to go so far as to allow the party actually to submit his case to the judgment of the state court on the merits, and then, if its judgment should be against him, but should not happen to finally determine the case, to exercise his right of removal. To induce a court of justice to infer a design to effect such an object, to

borrow the language of Chief Justice MARSHALL, "the intention should be expressed with irresistible clearness." But here, so far from that being the case, Congress has explicitly required that the application shall be made "before final hearing or trial." And the spirit and object of the act unite with its letter, in conducting imperatively to the conclusion that its meaning was to require it to be made before the party had voluntarily submitted his case to any trial or final hearing whatever in the state court.

Nor is this conclusion at all impeached by the rule that has been established by the Federal and other courts, under statutes authorizing appeals or writs of error from final judgments or decrees. It is generally held there, that the decree or judgment must be one purporting a full and final disposition of the case, and not on its face reserving a part of it for future decision by the court; yet, even in those cases, the rule has not been held with unreasonable strictness, but those decrees which substantially dispose of the merits of the controversy, are held final so as to allow an appeal, although some matters essential to a complete execution of the decree are reserved for further examination and decree. Thus, in *Forgay* v. *Conrad*, 6 How. U. S. 201, a decree was passed disposing of the general merits of the action, but directing an account of rents and profits, and reserving that subject for further decree. A motion was made to dismiss, on the ground that the decree was not final. The court said: "The question upon the motion to dismiss is, whether this is a final decree within the meaning of the Acts of Congress. Undoubtedly it is not final within the strict technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." See also *Bronson* v. *Railroad*, 20 How. 524, 531. But even if under this class of statutes it were held that the decree or judgment must be absolutely final to authorize an appeal, no argument could be drawn from it by analogy against the conclusion already arrived at. The difference in the objects of the two statutes would at once furnish an answer. The one is designed to regulate the exercise of an appellate jurisdiction, by which the judgments of an inferior tribunal may be reviewed. It is natural in such case to require the inferior court first to dispose, substantially at least, of the whole case, before the appellate power could be invoked. But the object of the other statute was not to provide for a review of the decisions of an inferior tribunal, but for the exercise of an election by a party to a suit in a state court, to transfer it to another court of original jurisdiction for trial. The design was to authorize an election between the two; not to give him a chance at both. And this object can only be accomplished by requiring, as the statute does, the application to be made before any trial or final hearing in the case. The object of the one statute was to prevent an appeal until everything had been decided. The object of the other was to authorize a removal only before anything had been decided.

It seems to me clear, therefore, that this case was not within the Act of Congress, and that the order for removal was unauthorized. I am aware that the learned judge of the District Court of the United States for this district has reached a different conclusion. His opinion upon

the subject is published in the American Law Register for April 1869. Upon this point he says: "If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court; then the application for removal would not have been filed before 'the final hearing or trial.' But the last order of the Supreme Court reversing the judgment of the Circuit Court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, *the same as if no judgment had ever been rendered.* The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken place."

If this is so, then this Court has been laboring under a great delusion. If, after a case has been three times in this court, twice on appeal from final judgments in the court below, if after the essential vital legal questions upon which its decision depends have been solemnly adjudicated by this court, and the cause remanded to the Circuit, it starts there anew, with nothing settled, "the whole case opened to litigation, as if no judgment had ever been rendered," then are not only our labors fruitless indeed, but those of the unfortunate litigants in the state courts are vainer than the labors of Sisyphus.

We have not so understood the law. We have uniformly applied to our decisions, so far as relates to matters within our jurisdiction, the same rule which the Supreme Court of the United States applies to its decisions; and have held that they become the law of the case, binding on the parties and the subordinate courts, and that the questions decided are not open to further litigation. We cannot have erred in this, unless the decisions of this court constitute an exception to the rule by which those of all other courts are governed.

I cannot but regret that this difference of opinion has arisen between this court and the learned judge of the District Court. It may be the cause of much embarrassment and expense to the parties. But inasmuch as the difference does exist, I know of no way to avoid its consequences, whatever they may be. There seems but one course open to this court, consistent with its duty to itself and to the state, when its appellate power is invoked in the regular course of judicial proceedings, and that is, to exercise the jurisdiction which it believes itself to possess, according to its best judgment whether that be well or ill founded.

As the conclusion already arrived at makes it unnecessary, I shall not enter upon the question whether it is competent for Congress to authorize a non-resident plaintiff who has voluntarily brought his suit in the state court to obtain a removal. I will only say that there is a marked difference between such a law and that which has heretofore been in force.

The appellate jurisdiction of the United States Supreme Court over the state courts has been sustained by the decisions of that court, and generally acquiesced in. And the validity of the twelfth section of the Judiciary Act, authorizing a non-resident defendant sued in a state court to have the case removed for trial to the Federal courts, has also been sustained as an alleged branch of the appellate power. But the argument by which a proceeding apparently so incongruous, as one by which the courts of original jurisdiction in one judicial system wrench a case bodily from the courts of original jurisdiction of another distinct

judicial system created and organized under another constitution of government, is attempted to be sustained, is not that there is any express provision in the Constitution of the United States to that effect, but that the proceeding is necessary in order to give effect to the general grants of judicial power which it contains. It is said that as questions may arise concerning the Constitution and laws of the United States, in suits pending in the state courts, and as citizens of other states may be sued as defendants in those courts, and as the judicial power of the United States extends to such controversies, unless there is a right of appeal and removal there is no way in which that judicial power can reach such cases: The argument rests therefore almost entirely on the assumed necessity of such right, in order to give effect to the grants of judicial power. Powerful arguments have certainly been made against the existence of the right in any case. These have been drawn from the acknowledged independence and sovereignty of the state and Federal governments, each within its own sphere, which doctrine has often been asserted by the Supreme Court of the United States. They have expressly told us that the separation of the two governments is so complete that Congress can vest no part of the judicial power of the United States in any state court, and can impose no duty whatever on any state officer. In view of these conclusions it is certainly difficult to show, by any satisfactory reasoning, by what authority Congress can authorize a Federal court to acquire original jurisdiction through the process and proceedings of a state court. These considerations, joined with the fact that by the ordinary rules of interpretation the general grants of judicial power, original and appellate, in the Constitution of the United States, would, in the absence of any professed intention on its face to regulate any other judicial system, be held to relate solely to the judicial system established by itself, have led many able minds to deny the existence of any power whatever to transfer a case by appeal or otherwise from a state to a Federal court. But against these arguments the power has been upheld, as already remarked, upon the ground of its absolute necessity, in order to give effect to the grants of judicial power. But if the power rests upon that ground, the necessity which gives it birth would seem to constitute its limit.

And in respect to a non-resident plaintiff, who voluntarily brings his suit in a state court, that necessity fails entirely. A right of removal is not necessary there, to enable the judicial power of the United States to reach the case, because he might have brought the suit in the Federal court in the first instance.

The constitutional grant had full effect from the outset, and the party in whose behalf the right to have the case tried in the Federal court is claimed, had it fully provided for him. Whether after he voluntarily waived it and sued in the state court, there is any power to provide for a removal of the suit in his favor, is certainly a different question from any that has been yet decided by the Supreme Court of the United States. There is at least some ground for denying the power in such a case, without impeaching the right of appeal and removal so far as they have already been sustained. Whether upon full examination this ground would be found sufficient, I shall not attempt further to inquire. But I will say that if this act is to have the effect claimed for it, if after